Supreme Court, U.S.
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No. 91-310

In The

Supreme Court of the United States

October Term, 1991

MERRITT E. JONES, individually; PAMELA JONES, by Merritt E. Jones, her father and next friend; JOHN DOE, individually; JANE DOE, by John Doe, her father and next friend,

Petitioners,

v.

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Clear Creek Independent School District's policy of allowing nonproselytizing, nonsectarian invocations and benedictions by student volunteers at high school graduation exercises violates the Establishment Clause of the First Amendment as a matter of law?

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit are correctly identified in the caption of this Opposition.

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OPINIONS BELOW

In May of 1989, the United States District Court for the Southern District of Texas entered final judgment in favor of Clear Creek Independent School District. This judgment was not reported. Subsequently, the United States Court of Appeals for the Fifth Circuit rendered a decision in favor of the School District which was reported at 930 F.2d 416 (1991). The Motion for Rehearing was denied by the Fifth Circuit. Copies of these decisions

have been attached as an Appendix to the Petition for Writ of Certiorari, and for the sake of brevity, will not be reprinted here.

JURISDICTION

This Court's jurisdiction is not in question.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides the following guidance in this case:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Underlying Facts

Petitioner, Merritt Jones, is the father of Petitioner, Pamela Jones. Pamela is a 1987 graduate of Clear Lake High School. Petitioner, John Doe, is the father of Petitioner, Jane Doe. Jane is a 1988 graduate of Clear Lake High School who was added to the suit to remedy a standing problem. Petitioners will be referred to collectively as "Jones." Clear Creek Independent School District is a duly constituted body politic, with powers and

jurisdiction pursuant to Texas law. Respondent will be referred to as "School District" or "District."

The Jones brought suit to enjoin the School District from allowing "prayers" to be given at high school graduations. In particular, the Jones complain of the invocation and benediction given during the 1986 Clear Lake High School graduation ceremonies. While there is some dispute over the exact wording, the Jones contend that the 1986 invocation and benediction were given as follows:

Invocation

Lord,

> Thank you for allowing us to attain this milestone in our lives. Help us all to remember your great kindness and love [unintelligible] we celebrate this great accomplishment in our lives. Since the high school years are a painful growing times undoubtedly, for each, the disappointments and mishaps that have occurred over the last years have just seemed [backed up?] When we take the time in the future to talk over our high school years in the halls of memories, the victories [unintelligible], the successes and defeats [unintelligible], and the friendships above all that never ever meet will all shine through with brilliant radiance and happiness that will only become more meaningful and beautiful as the years pass us by. Thankfully, nothing short of your Gospel and power will ever eclipse these great visions and memories. It is these unequivocal times that we are here to

commemorate this afternoon. [Sentence unintelligible.] Just bless and keep each of us over the years 'til someday we will all meet again. Amen.

Benediction

Let us pray.

Dear Lord,

As we emerge from the secluded passages please inspire us with your grace and great words of [unintelligible] heaven. Instill in us the spirit of dignity and pride. Inspire us to face all our challenges with confidence and turn obstacles into stepping stones to success. Amen.

The Jones have not complained of any invocations or benedictions since those delivered at the 1986 graduation ceremonies. In fact, the Jones have admitted that the invocation and benediction given at the 1987 ceremony were within constitutional parameters.

On December 15, 1987, the School District adopted a resolution, formalizing a previously unwritten doctrine, allowing for the inclusion of invocations and benedictions that are "nonsectarian" and "nonproselytizing" in nature. On January 19, 1988, the School District filed a Motion for Leave to Supplement or File Dispositive Motion Beyond Cut-Off. This motion was prompted by recent case law developments, the school board resolution and the late filing of a responsive pleading by the Jones. The district court granted the School District the requested relief.

The Jones claimed the resolution was still unconstitutional and that further discovery was necessary. The district court found there was no longer a justiciable controversy and summary judgment was granted in favor of the School District.

B. Proceedings Below

On May 11, 1987, Petitioners filed suit pursuant to 42 U.S.C. § 1983, challenging as unconstitutional the School District's policy of allowing invocations and benedictions allegedly containing traditional Christian prayer at its high school graduation ceremonies. Petitioners sought a permanent injunction and declaratory relief that the practice and custom of the Respondent violated Petitioners' rights under the First Amendment of the United States Constitution.

The School District was granted summary judgment by the district court on May 12, 1989. This finding was premised on the School District's Board of Trustee's resolution adopted on December 15, 1987 which permitted only the delivery of nonproselytizing, nonsectarian invocations and benedictions, written by volunteer students, to be delivered at graduation exercises away from the high school's grounds. The court reasoned that this practice does not constitute state endorsement of religion under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Petitioners appealed to the Fifth Circuit.

The Fifth Circuit affirmed the lower court's holding. The Fifth Circuit also held that the School District's practice passes constitutional muster under the tripartite

Lemon test. The invocations (the term being used synonymously with benedictions) served to solemnize the graduations. *Jones v. Clear Creek Independent School District*, 930 F.2d 416, 420 (1991). The effect of the invocations neither advanced nor endorsed religion, but was merely on accommodation of religion. *Id.* at 422. Lastly, there is no excessive entanglement as the School District was not involved with any religious institutions in its approval of the invocations. *Id.* at 423.

REASONS FOR DENYING THE WRIT

A. The Present Case Is Factually Distinguishable From *Weisman v. Lee.*

Petitioners claim that the facts in this case are "virtually identical" to those found in the case of *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991). However, *Weisman* is distinguishable in a number of very important respects. First, the invocation at issue in *Weisman* was delivered by a rabbi. In the present case, the invocations were presented by student volunteers. Unlike the rabbi, the student volunteers were not clothed with the indicia of religion. Second, the presentation of an invocation by a rabbi implies a certain degree of entanglement with a particular religion, namely Judaism. The volunteer students do not give the appearance of any affiliation or association with a given religious sect. Third, the age of the students at issue provides another critical distinction between the two cases. In *Weisman*, the plaintiff was a member of the graduating class at a public *middle school*. In *Jones*, the plaintiffs were

members of a *high school* graduating class. Finally, the location of the ceremonies at issue is also important. In *Weisman*, the graduation exercises were held on school grounds. In *Jones*, the graduation exercises were held away from school grounds. Due to each of these factual differences, *Jones* should not be tied to *Weisman* and the jurisprudence in *Jones* need not be delayed, pending the outcome in *Weisman*. Petitioners' request to hold this petition, therefore, should be denied.

B. The Fifth Circuit Correctly Applied the *Lemon* Test.

The Fifth Circuit, in a unanimous decision, found the actions of the School District to be constitutional under the *Lemon* test. The Petitioners argue, however, that the Fifth Circuit improperly applied each of the three prongs of the test.

1. The Effect Prong.

Petitioners would have this Court hold that, regardless of the context in which it is uttered, any reference to a deity is "prayer," and thus, violative of the "effect" prong in *Lemon*. To reach this conclusion, however, would undercut the logic of the *Lemon* test: namely, to treat each Establishment Clause case as fact specific.

As the Fifth Circuit correctly noted, in determining the primary effect of the School District's Resolution, the Resolution must be viewed in the context of an entire graduation ceremony. *Jones*, 930 F.2d at 421. Moreover, the Resolution must be viewed from the perspective of its intended audience, namely, high school seniors and their

parents, the majority of whom have reached the age of adulthood. Viewed in this light, the "effect" of the School District's Resolution is to solemnize and enhance the significance of the graduation ceremony to its attendees. Given, in particular, the age of the ceremony's attendees and the location of the event, the Resolution no more communicates an endorsement of religion than does our country's national motto or Pledge of Allegiance.

2. The Purpose Prong.

Petitioners have argued that the Fifth Circuit failed to examine the "actual purpose" behind the School District's Resolution. Contrary to what Petitioners contend, however, the Fifth Circuit did, in fact, examine the Resolution's actual purpose and subsequently concluded that the School District's "solemnization" rationale does not constitute a pretext for the introduction of prayer into the schools. *Jones*, 930 F.2d at 420. Moreover, the Fifth Circuit's inquiry fully satisfied the "deferential and limited" review that the Supreme Court has deemed proper. *Wallace v. Jaffree*, 472 U.S. 38, 75-76 (1985).

3. The Entanglement Prong.

As Justice O'Connor stated in *Lynch*, "[t]he entanglement prong of the *Lemon* test is properly limited to *institutional* entanglement." *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (emphasis added). To date, the Petitioners have yet to identify the religious institution or institutions that will become excessively entangled with Clear Creek Independent School District by virtue of the School District's adoption of the Resolution. For that matter, because the

Resolution explicitly dictates that invocations must be nonsectarian and written and presented by student volunteers, the Resolution "effectively excludes religious institutions from its purview." *Jones*, 930 F.2d at 423.

The Petitioners argue that Justice O'Connor's concurrence in *Lynch* is not dispositive, given the factual distinctions between *Lynch* and *Jones*. However, in their attempt to distinguish the two cases, Petitioners have mischaracterized the operation of the Resolution. The administrative review mandated by the Resolution is nothing more than a cursory screening process which occurs in advance of the graduation ceremony. The "government," as the Jones contend, is by no means "offering" the invocation. The task, as is the task of composing the invocation's text, is reserved exclusively for student volunteers.

CONCLUSION

In effect, the Petitioners seek a holding that all prayers are unconstitutional. Neither the Fifth Circuit not this Court's previous holdings agree. The Fifth Circuit stated: "We reject a reading of the First Amendment that would freeze either church and state or religion and politics into perpetually antagonistic postures." *Jones*, 930 F.2d at 420. This Court has also addressed this conflict. "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984). "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S.

306, 313 (1952). These pronouncements illustrate that not all "prayers" are constitutional. In the case at bar, the Fifth Circuit has found the "prayers" in question to be constitutional.

The Petition for Writ of Certiorari should be denied, and this petition should not be held pending the final outcome of *Weisman*.

Respectfully submitted,

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